~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE [redacted], A U.S. PERSON) Docket Number: PR/TT 15-52

MEMORANDUM OPINION

In this Memorandum Opinion, the Court considers whether the appointment of an amicus curiae is appropriate in the particular circumstances of this case. For the reasons set forth below, the Court answers that question in the negative.

On June 16, 2015, at 4:54 p.m., the government filed a proposed application in the above-captioned matter following an Emergency Authorization made pursuant to the pen-register and trap-and-trace provision of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1843. The EA was granted at 6:44 p.m. on June 11, 2015, by the Assistant Attorney General for National Security, acting as the Attorney General pursuant to 50 U.S.C. § 1801(g), and it authorized the Federal Bureau of Investigation to use a pen register or trap-and-trace device in connection with a counterterrorism investigation of the individual named in the caption. Although an EA may have a duration of up to seven days, *see* 50 U.S.C. § 1843(c)(1), the FBI has already terminated its use of the authority granted by the EA and does not request prospective authority to use the device.

Pursuant to 50 U.S.C. § 1843(a)(2), the government is required to file its final application for Court approval "not more than 7 days" after the EA. If the Court does not grant such approval within the same seven-day period, moreover, the government is generally precluded from using any information that it has obtained or derived from the EA. *See id.* § 1843(c)(2). The government filed its final application today, June 18, 2015, at 10:59 a.m., and its seven-day period for obtaining Court approval ends today at 6:44 p.m.

Section 401 of the USA FREEDOM Act, Pub. L. No. 114-23 (June 2, 2015), which is codified at 50 U.S.C. § 1803(I), provides for the appointment of amicus curiae— "consistent with the requirement of subsection (c) [that proceedings under FISA be 'conducted as expeditiously as possible'] and any other statutory requirement that the court act expeditiously or within a stated time"— in two circumstances. *See id.* § 1803(i)(2). First, the Court "shall appoint" an amicus curiae "to assist [the] court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate." *Id.* § 1803(i)(2)(A). An amicus appointed under this provision must be drawn from a pool of no fewer than five individuals designated by the presiding judges of this Court and the Foreign Intelligence Surveillance Court of Review as "eligible to serve as amicus curiae" and must "serve pursuant to rules the presiding judges may establish." *See id.* § 1803(i)(1), (i)(2)(A). Second, the Court "may appoint" an amicus curiae "including to provide technical expertise, in any instance as [the] court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief." *Id.* § 1803(i)(2)(B).

In the opinion of the Court, the application in this matter "presents a novel or significant interpretation of the law" within the meaning of Section 1803(i)(1). To elaborate, the application requires the Court to determine whether two particular [redacted] constitute "specific selection terms" under the definition set forth at 50 U.S.C. § 1841(4), which, like the amicus curiae provision, was recently added to FISA by the USA FREEDOM Act. Applying that new, multi-faceted definition to the unusual facts of this case requires a "novel . . . interpretation of the law." *See id.* § 1803(i)(2)(A).

The Court finds, however, that the appointment of an amicus curiae in this matter is not appropriate, notwithstanding the novel question presented by the application. First, the USA FREEDOM Act is only two weeks old, and although the Court is working to identify potential candidates to designate to serve as amici pursuant to Section 1803(i)(1), no such designations have yet been made. It is therefore impossible to appoint an amicus pursuant to Section 1803(i)(2)(A), which calls for appointment "of an individual who has been designated" under that Section 1803(i)(1).

Under Section 1803(i)(2)(B), the Court may nonetheless appoint to serve as an amicus someone other than those individuals designated pursuant to Section 1803(i)(1). Based on the following considerations, however, the Court finds that such appointment is not appropriate. The novel question in this case was first presented to the Court in a proposed application submitted just over 48 hours before the expiration of the seven-day EA deadline discussed above. There is precious little time in the hours remaining before that deadline to allow for meaningful amicus participation. Delaying the proceedings beyond the deadline to accommodate a greater role for

an amicus, moreover, would be tantamount to a denial of the application, as the government would be precluded from using the information, and such delay would not be "consistent with the requirement of subsection (c) [that proceedings under FISA be 'conducted as expeditiously as possible'] and any other statutory requirement that the court act expeditiously or within a stated time." *See id.* § 1803(i)(2).

There may be a case of such import that an effort to compress amicus participation and judicial resolution into two days would be warranted, but this is not the one. The novel issue presented here has only limited prospective importance. More specifically, the government has already terminated its use of the pen register and trap-and-trace device authorized by the EA and does not request prospective authority to use it. It appears from the application, furthermore, that the device was used only for a short period of time and that only a small amount of information was acquired through its use.

For the foregoing reasons, the Court finds that the appointment of an amicus curiae is not appropriate in this matter.

ENTERED, the 18th day of June, 2015.

JAMES E. BOASBERG
Judge, United States Foreign
Intelligence Surveillance Court

I, [redacted], Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original

[redacted]